

Special Master George Finkle

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates.

No. G 02-45

PREMERA'S PROCEDURAL
RESPONSE TO WSMA'S REQUEST
FOR AN EMERGENCY HEARING

INTRODUCTION

In designating its President and its chief economist as purported "experts," the Washington State Medical Association ("WSMA") is attempting to make a blatant end-run around the prohibition against disclosing sensitive data to those who could thereby benefit economically.

There is neither justification nor need for an emergency hearing. To the contrary, WSMA's delay in identifying its experts has brought on whatever timing problems it now says it faces.

Mr. Coopersmith neglects to inform the Special Master that, after receipt on October 21st of WSMA's identification of its President and chief economist as experts, Premera sent discovery requests on October 24th to WSMA in order to develop the evidence in support of Premera's opposition to the disclosure of "Confidential" and "Attorneys' Eyes Only" materials to those two individuals. Until WSMA produces the

PREMERA'S PROCEDURAL RESPONSE TO
WSMA'S REQUEST FOR AN EMERGENCY
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1 requested documents and until Premera has an opportunity to depose WSMA's President
2 and chief economist, Premera cannot fully respond to the substance of WSMA's motion.

3 The Special Master should deny WSMA's request for an emergency hearing, set
4 November 7th as the deadline for Premera's Substantive Response on the substantive
5 issues, and schedule a hearing for November 10th on the substantive issues raised in
6 WSMA's motion.

7 Since WSMA argues that Premera has the burden of proof, Premera should have
8 the last word on the substantive issues. Also, the Seventh Order does not contemplate a
9 reply brief under these circumstances. Hence, the Special Master should not permit any
10 further briefing after Premera's November 7th Substantive Response.

11 ARGUMENT

12 1. WSMA delayed until October 21st to give notice of its intent to use its
13 President, Dr. Jeff Collins, and its Director of Health Care Economics, Robert Perna, as its
14 experts. WSMA asserts that it is selecting these in-house people as its experts only
15 because it cannot afford to hire any outside experts. There is no evidence, however, to
16 substantiate the claim that an organization as large and as well-financed as the WSMA has
17 no money to hire any experts.

18 2. In compliance with the Protective Order, Premera objected in writing on
19 October 23rd to these individuals seeking Premera's Confidential and Attorneys' Eyes
20 Only documents and information. Attached as Exhibit A to the accompanying
21 Declaration of Thomas E. Kelly, Jr. ("Kelly Declaration") is a copy of Mr. Kelly's
22 October 23rd letter to Mr. Coopersmith.

23 3. WSMA takes the position that Premera has the burden of proof, under the
24 Protective Order, to show that release of the documents and information to Dr. Collins and
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1 Mr. Perna would be “inappropriate.” See Paragraph 3(b)(ii)(3) at page 17 of the
2 Protective Order.

3 4. In order to obtain evidence needed to meet that burden of proof, Premera
4 sent WSMA on October 24th a Second Set of Requests for Production of Documents, a
5 copy of which is attached as Exhibit B to the Kelly Declaration. The Second Set
6 specifically requests documents relevant to the appropriateness of these two individuals
7 having access to Premera’s documents.

8 5. For the same reason, Premera has noted the depositions of the two
9 witnesses, for November 3rd and 4th. The deposition notices are attached as Exhibits C
10 and D to the Kelly Declaration. Premera is willing to change the time and dates to a
11 mutually convenient time in order to accommodate schedules. Also, if WSMA can get its
12 discovery responses back to Premera earlier than Oct. 31st, Premera is willing to accelerate
13 the dates for the depositions.

14 6. If WSMA provides the requested documents and if the depositions are
15 taken as now scheduled, Premera should be able to submit its Substantive Response to
16 WSMA’s motion within three days after the second deposition, that is, by the end of
17 business on November 7th.

18 7. Since WSMA argues that Premera has the burden of proof regarding
19 disclosure of documents to Dr. Collins and Mr. Perna, Premera should have the last word
20 on the substantive issues in its Substantive Response and WSMA should not be permitted
21 to file a reply brief.

22 8. In any event, the Seventh Order does not contemplate a reply brief under
23 these circumstances. Paragraph 2, at page 7, of the Seventh Order states, in regard to a
24 dispute over document production, which is what this dispute is:

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PREMERA'S PROCEDURAL RESPONSE TO
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1 The party seeking production [here, WSMA] shall file with
2 the Special Master its motion and supporting brief to
3 compel production within 7 business days from the date of
4 receipt of the objection. The party objecting to the request
5 [here, Premera] shall have 7 business days to file its
6 response and supporting brief.

7 In this case, WSMA filed its motion and brief on October 27th. Premera would
8 normally have seven days -- until November 5th -- to file its response. But, in light of
9 the time needed for (a) WSMA to produce the requested documents, (b) Premera's
10 counsel to read those documents and prepare for the depositions, (c) Premera's counsel to
11 take the two depositions (one of which will presumably be in Spokane), and (d) Premera's
12 counsel to write its Substantive Response after having obtained the written and oral
13 discovery, Premera respectfully requests that it have two extra days, that is, until
14 November 7th, to file its Substantive Response.

15 Of course, if WSMA decides to serve and file a supplemental brief in addition to
16 its emergency motion, then Premera would be entitled to 7 days from the date of receipt of
17 that supplemental brief to serve and file its Substantive Response.

18 CONCLUSION

19 Without having oral argument on the procedural aspects of WSMA's motion, the
20 Special Master should:

- 21 1. Direct WSMA to produce the documents that Premera has requested by
22 October 31st.
- 23 2. Confirm that the depositions of Mr. Perna and Dr. Collins will be taken as
24 scheduled in the deposition notices (November 3rd in Seattle for Mr. Perna and November
25 4th in Spokane for Dr. Collins), unless Premera and WSMA agree to alternative dates.

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3. Direct Premera to file its Substantive Response within 3 days after the second deposition is completed or, if WSMA serves a supplemental brief, within 7 days after the filing of the supplemental brief, whichever is later.

4. Schedule oral argument for November 10th on the substantive issues raised in WSMA's motion.

DATED this 28th day of October, 2003.

PRESTON GATES & ELLIS LLP

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PREMERA'S PROCEDURAL RESPONSE TO
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